No. 14-1470

In The

Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Minnesota

BRIEF OF *AMICUS CURIAE* MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND MINNESOTA SOCIETY FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Minnesota Association of Criminal Defense Lawyers (MACDL) and the Minnesota Society for Criminal Justice (MSCJ) respectfully submits this brief of *amicus curiae* in support of Petitioner William Robert Bernard Jr.[1]

MACDL is a professional organization of criminal defense lawyers whose mission is to foster, maintain and encourage the integrity, independence, and expertise of the defense lawyer in criminal cases; to promote the proper administration of criminal justice, including the protection of individual rights; to advance the knowledge of law in the field of criminal defense by lectures, seminars and publications; and to represent and lobby on behalf of the Association before the legislative, executive and judicial bodies which determine policy for the state and federal governments in a manner consistent with the Association and its goals and objectives.

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[1] All parties consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* MACDL affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* MACDL, its members, or its counsel made a monetary contribution to its preparation or submission.

The MSCJ is an organization of approximately fifty Minnesota defense attorneys. This college meets monthly to discuss developments in Minnesota criminal law and DWI defense practice. The MSCJ seeks to not only educate its members and other members of the bar regarding issues in criminal defense and the ancillary civil consequences of our criminal laws, but promotes justice by supporting change in the laws – both legislatively and through litigation in the courts. Overall, the MSCJ strives to protect and advance the civil rights and constitutional rights of the people of Minnesota, and as such has a largely private interest in the above captioned matter.

Minnesota was one of the first states to adopt a DWI test refusal statute, and the MACDL and MSCJ have been dealing with the practical and constitutional ramifications of such a law for decades, and intend to utilize their experience and expertise in clarifying the issues currently before the Court.

SUMMARY OF THE ARGUMENT

Whether ordinary persons may be criminally prosecuted for declining to consent to a police search of their bodies raises serious questions about the acceptable boundaries of police investigatory methods. Making it a criminal offense to do what in this nation of limited government power always has been recognized as a protected freedom – the freedom to say "no" – runs completely contrary to long-established

custom and good policy. There is no governmental or societal interest sufficient to justify the havoc that such laws would wreak on individual liberties by compelling the average person's cooperation with the police for the explicit purpose of providing evidence for one's own incarceration. If such laws are deemed constitutional, then additional laws, designed to promote the efficacy of law enforcement at the expense of simple freedoms, surely will follow, to the great detriment of all.

ARGUMENT

This Court should reject as contrary to the Constitution any attempt to force cooperation with a police investigation by making it a crime simply to decline to consent to a search.

I. Laws Requiring Persons to Consent to Warrantless Searches of their Bodies are Incompatible with Fundamental Constitutional Protections of Individual Privacy and Liberty.

The United States Constitution guarantees every citizen the fundamental right to be free from unreasonable police searches. U.S. CONST. AMEND. IV. The Fourth Amendment generally limits such reasonable searches to those (1) supported by a warrant, (2) issued by an impartial magistrate, (3) based on a finding of probable cause, and (4) particularly

describing the place to be searched, and the persons or things to be seized. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

This Court has long affirmed a person's right "to insist that the [government agents] obtain a warrant to search and that [that person] *may not constitutionally be convicted for refusing to consent to the inspection.*" *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 540 (1967) (emphasis added). The Minnesota statute at issue here, however, runs directly contrary to that basic right by making it a crime for a driver to decline a chemical test of his breath, blood, or urine when requested by a peace officer who has "probable cause" to believe the driver has violated the prohibition on driving while impaired by alcohol or other intoxicants. Minn. Stat. §169A.20, subd. 2 (2014). The statute makes it a crime, punishable by up to seven years in prison, simply to insist on one's fundamental right to live free from warrantless government searches of one's own body.

II. The Political Push for a DWI Exception to the Fourth Amendment Has Weakened Our Courts' Resolve to Enforce Constitutional Curbs on Questionable Legislation.

In the specific context of laws forbidding drinking and driving, Minnesota Courts have attempted repeatedly to find an exception to the warrant requirement that uniquely justifies a police search for evidence of a driver's intoxication; these efforts to find a DWI exception to the Fourth Amendment have produced inconsistent and questionable results – perhaps because Fourth Amendment analysis should not turn on the nature of the crime giving rise to the case considered. As Justice Scalia recently noted, "There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated." *United States v. Jones*, 565 U.S. ___, ___, 132 S. Ct. 945, 954 (2012).

The political origins of the extra-constitutional measures to "combat" impaired driving in Minnesota are well known; even the courts of this state have supported the efforts with over-wrought rhetoric better left on floor of the legislative chambers: "The trail of broken lives, bodies, and property left by drunk drivers is a holocaust on our highways." *Szczech v. Comm'r of Pub. Safety*, 343 N.W. 2d 305, 306 (Minn. Ct. App., 1984); *see also Gray v. Comm'r of Pub. Safety*, 505 N.W.2d 357, 360 (Minn. Ct. App. 1993) ("It is undisputed that the gravity of public concern is great."), *rev'd,* 519 N.W.2d 187 (Minn. 1994). In their efforts to find constitutionally plausible support for

the legislature's enactments, however, the courts too often have produced decisions lacking intellectual rigor.

In *State v. Shriner*, 751 N.W.2d 538, 549-50 (Minn. 2008), for example, the Minnesota Supreme Court found that in the case of a felony drunk driving violation the "exigent circumstances" exception permitted police to conduct the search without a warrant: "The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause." *Id.* at 549. The next year the Minnesota Supreme Court extended that holding to include misdemeanor offenses, noting that "exigency does not depend on the underlying crime; rather, the evanescent nature of the evidence creates the conditions that justify a warrantless search." *State v. Netland*, 762 N.W.2d 202, 213 (Minn. 2009).

This Court abrogated both *Shriner* and *Netland*, declining to find a single-factor exigent circumstance exception to the warrant requirement based only on probable cause to believe there is impairing alcohol in a driver's body: "The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a 'now or never' situation." *Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1561 (2013).

After *McNeely*, the Minnesota Supreme Court embraced "consent" as the appropriate exception to the warrant requirement, even though drivers in Minnesota are told that Minnesota law *requires* them to submit to testing, and that refusing to "consent" is a crime: "the fact that someone submits to the search after being told that he or she can say no to the search supports a finding of voluntariness." *State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013).

In cases charging a "refusal," however, Minnesota courts still sought an appropriate exception to the warrant requirement because even a compelled "consent" was unavailable when the driver did not take the test. The answer, provided by the court below in Petitioner's case, was the "search-incident-to-arrest" exception. Whether that exception truly applies is one of the central issues raised in the Parties' Briefs, and need not be re-examined here; but even in the unlikely event that it does, the Minnesota law making it a crime to refuse to consent to the search remains constitutionally suspect given that the demand for consent rests solely on the discretion of the peace officer's subjective conclusions, and dispenses entirely with the preferred neutral analysis of the magistrate.

III. Leaving the Protection of Privacy and Personal Liberties to the Discretion of the Police is Bad Law and Bad Public Policy.

May the citizen still insist on a warrant, without subjecting himself to prosecution, when the basis for

the requested search is nothing more than a peace officer's personal conclusion of probable cause? According to the Minnesota Supreme Court in this case, the answer is "no." But this Court repeatedly has warned that "bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations only in the discretion of the police." *Katz*, 389 U.S. at 358-59.

This Court also has observed that "[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald v. United States*, 335 U.S. 451, 455-56 (1948). It further has observed that,

> In their understandable zeal to ferret out crime, and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

Trupiano v. U.S., 344 U.S. 699, 705 (1948); *accord United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("Security against unlawful searches is more likely to be attained by resort to search warrants than by

reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.").

This case not only re-confirms the need for warrants, and their pre-approval by judges, to provide security against unreasonable police intrusions upon the private lives of individuals, but also highlights how dispensing with the neutral and detached magistrate can lead to police abuse of excessive discretion with no remedy for the individual who chooses not to cooperate with the officer demanding a search of the individual's body. That individual is deemed a criminal for declining the search, even if demonstrably not guilty of the predicate offense supposedly justifying the arrest in the first place.

IV. A Law Criminalizing Refusal to Submit to a Warrantless Corporeal Search Violates Fundamental Privacy Rights Deeply Rooted in Our Legal and Cultural Heritage.

This Court consistently has recognized the right – inherent both in the Fourth and Fifth Amendments – of a citizen to choose to withhold cooperation with the police, and specifically to withhold either consent to a search or responses to police inquiries; indeed, the Court routinely has invoked the right to withhold cooperation when examining the boundaries of permissible police investigation. In *United States v. Drayton*, 536 U.S. 194, 197 (2002), for example, it described it as a protected freedom: "The Fourth

Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is *free to refuse*." *Id.* at 197 (emphasis added). In *Florida v. Bostick*, 501 U.S. 429 (1991), this Court observed that "the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could *refuse to cooperate*." *Id.* at 431 (emphasis added). In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court concluded that even when police have reason to believe that criminal activity is afoot, they may not punish an uncooperative suspect: "Of course, the person stopped is not obliged to answer, answers may not be compelled, and *refusal to answer furnishes no basis for an arrest*." *Id.* at 34 (White, J., concurring) (emphasis added); *accord United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("the person to whom questions are put remains free to disregard the questions and walk away").

In these and other opinions, this Court accepts the freedom to refuse consent as a fundamental, inherent right, without need of explication, even though the citizenry may be unaware of its breadth. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("While knowledge of the right to refuse consent is one factor to be taken into account, the government

need not establish such knowledge as the sine qua non of an effective consent.").

To protect the citizen's freedom to refuse cooperation, this Court specifically has restrained the police from suggesting any obligation on behalf of the person questioned: the police may request consent to search, *"as long as the police do not convey a message that compliance with their requests is required."* *Bostick*, 501 U.S. at 435 (emphasis added). Petitioner's case presents precisely the situation forbidden by this Court in *Bostick*: In Minnesota, a driver whom the police suspect of being in violation of the proscription against driving while under the influence is told that the law *requires* them to cooperate with the police by consenting to a test of their breath, blood, or urine, and that refusal to submit to the test requested will result in criminal prosecution.

Such a law simply cannot be squared with our society's – and this Court's – traditional protection of the right of the individual to say "no." Permitting Minnesota's refusal law to stand invites legislative bodies across the country to promulgate further measures aimed at coercing the cooperation of the individual with his or her own prosecution.

V. The Risk of Further Deterioration of the Individual's Right to Privacy and Personal Liberty Requires that the Refusal Statute be Found Unconstitutional.

If the Minnesota crime of test refusal is deemed constitutional, and merely arresting a person provides the police with the authority to require a search of his or her body, then legislatures would be free to enact any number of laws requiring citizen cooperation with police investigations that would all but eliminate a deeply rooted constitutional freedom.

Alcohol-related traffic deaths are but one set of many potential excuses to justify the elimination of the neutral and detached magistrate in favor of unfettered police discretion in compelling a search. Drivers suspected of speeding or texting would lead the list based on the available data.[2] The legislature could criminalize refusal to allow a warrantless search of a smart phone or vehicle computer upon probable cause to arrest for distracted driving or speeding, thereby effectively gutting this Court's recent holding

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[2] Of the 361 traffic fatalities in Minnesota in 2014, the State Department of Public Safety compiled the following data: 88 (24%) were known to be drunk-driving related; 94 (26%) were known to be speed related; and 61 (17%) were known to be distracted driving related. *See* Minn. Dept. of Pub. Safety, Office of Traffic Safety, ***Minnesota Motor Vehicle Crash Facts*** (2014), at https://dps.mn.gov/divisions/ots/reports-statistics/Pages/default.aspx (last visited Jan. 26, 2016). If the 24% of 361 fatalities justifies this extreme measure, certainly speeding and distracted driving do too, but the list need not stop there.

in *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473 (2014).

Likewise, according to the Centers for Disease Control and Prevention "[t]he United States is experiencing an epidemic of drug overdose (poisoning) deaths," resulting in 47,055 casualties in the United States in 2014.[3] If the 88 alcohol-related deaths on Minnesota roads in 2014 necessitates laws criminalizing a failure to consent to police searches, surely the scores of thousands of drug overdose deaths does too. Arresting suspected drug-abusers on probable cause could thereby also permit the search of their bodies to secure evidence of the drugs. Any number of other substances might also be found in bodies of the citizenry that would lend evidentiary support for criminal prosecutions. Those who object may be prosecuted for the refusal instead.

In 1997, this Court rejected neighboring Wisconsin's "blanket exception" to the knock-and-announce requirement deemed by Wisconsin as "necessitated by the special circumstances of today's drug culture." *Richards v. Wisconsin*, 520 U.S. 385, 392 (1997). But if a statute allowing an arrest for refusing a search is justified by the public health concern of impaired

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[3] *See* Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, *Increases in Drug and Opioid Overdose Deaths – United States, 2000-2014* (last visited Jan. 1, 2016), copy accessed at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm?s_cid=mm6450a3_w (last visited Jan. 20, 2016).

driving, there is equal justification for police to arrest anyone who declines a body cavity search after an arrest for "probable cause" involvement in the drug trade. The Hobson's choice to the arrestee in such circumstances would always be between the indignity of acquiescence to a warrantless search or prosecution for the crime of refusing.

Upon probable cause to believe that a suspect has committed murder or rape, the legislature could empower police to demand consent to a warrantless test for DNA or consent to a search for weapons in the suspect's home. The suspect who refuses to grant consent to the searches, or who resists long enough to be *deemed* to have refused,[4] may then be prosecuted for the refusal with the same potential penalty as the original crime suspected.

The proof necessary to convict under the Minnesota Statute, moreover, does not require proof that the underlying predicate crime was committed.[5] The only elements required are proof that the police had "probable cause," that they made an appropriate demand, and that the subject of the demand declined to consent to the search requested. Whether the "probable cause" ultimately proves to be misplaced is

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[4] *See State v. Hagen*, 529 N.W.2d 712, 714 (Minn. Ct. App. 1995) ("A driver who fails to respond to an officer has refused to take the test").

[5] *See State v. Olmscheid*, 492 N.W.2d 263, 266 (Minn. Ct. App. 1992) (conviction on the refusal charge "not legally inconsistent" with acquittal on the charge of driving under the influence).

not a defense. In the murder investigation described above, for example, if the suspect refused to submit to the DNA testing, he could be convicted and sentenced to life in prison, despite a later discovery that the presumed deceased was in fact very much alive. While ethical prosecutors might reasonably decline prosecution in such cases, their discretion is not so fettered as to require it; the criminally proscribed conduct, after all, has indeed been committed.

The police, by virtue of such laws, will be disinclined to seek court approval for their searches in any but the rarest of cases. If a police investigator believes she has sufficient probable cause to support a request for judicial approval of the search at issue, then her demand for consent from the suspect is *ipso facto* deemed constitutionally approved by the legislature. This legal mechanism, that effectively removes any police incentive to seek judicial authorization of their investigative techniques, upsets the constitutional equilibrium by transferring discretion from the neutral and detached magistrate to the zealous officer on the street in contravention of this Court's well established precedent:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the

> often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

The Minnesota refusal statute abrogates the entire "point" of the Fourth Amendment by legislatively delegating to the police the power to insist on citizens' consent and cooperation with law enforcement prerogatives, under penalty of criminal sanctions. Delegating such expansive power to the police officer on the street, rather than to a neutral and detached official renders the Amendment's protection a mere form of words: "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in [demanding consent to] a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson*, 333 U.S., at 14.

CONCLUSION

This Court should strike down as unconstitutional the Minnesota refusal statute that makes it a crime to decline a request to submit to a warrantless search of the individual's body.

Respectfully submitted,

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